United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7069

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket Nos., 75-7069, 75-7206, 75-7207, 75-7208

COMPANIA ESPANOLA DE PETROLEOS, S.A.
Plaintiff-Appellant-Appellee,

against

NEREUS SHIPPING, S.A.
Defendant-Appellee-Appellant,

and consolidated cases.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF COMPANIA ESPANOLA DE PETROLEOS, S.A. AS APPELLANT IN DOCKET NO. 75-7069 AND APPELLEE IN DOCKET NOS. 75-7206 AND 75-7208

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The Issues Presented for Review

1. Is the opinion and order of the district court, dated December 18, 1974 an appealable order? YES.

2. Are disputes arising under a guaranty subject to the arbitration clause of the main contract? No.

3. Was there a written agreement for arbitration between the guarantor and obligee in the main contract? No.

4. Did the district court properly dismiss, without trial, the complaint for declaratory judgment in action 74 Civ. 5102? No.

Statement

A. *Preliminary*

Compania Espanola de Petroleos has appealed from the decision and order of Judge Stewart of December 18, 1974, in civil action 74 Civ. 5102 which denied its motion for injunctive relief and dismissed its complaint which sought a declaratory judgment on whether it had to arbitrate with Nereus Shipping, S.A. pursuant to a guaranty of a maritime contract of affreightment. Nereus Shipping S.A. has appealed from the decision in subsequent related proceedings brought by Hidrocarburos Y Derivados, C.A., the charterer, in which Judge Stewart ordered a consolidated arbitration among the three parties.

B. *The Parties*

Compania Espanola de Petroleos, S.A. (hereinafter "Cepsa"), is a large integrated Spanish oil company

(A-80) and is the appellant in docket number 75-7069 and an appellee in docket number 75-7206.

Nereus Shipping, S.A. (hereinafter "Nereus"), is a Liberian corporation and is the agent for owners of various vessels (A-62), and is the appellant in docket numbers 75-7206, 75-7207 and 75-7208 and the appellee in docket number 75-7059.

Hidrocarburos Y Derivados, S.A. (hereinafter "Hideca") is a Venezuelan corporation engaged in the oil business and is an appellee in docket numbers 75-7206, 75-7207 and 75-7208.

C. *The Relevant Facts*

Nereus, as "Owner", and Hideca, as "Charterer", entered into a three-year contract of affreightment (hereinafter the "C.O.A.") dated at New York, N. Y., January 27, 1971 pursuant to which Nereus was to transport 600,000 tons of petroleum products, 10% more or less, from the Persian Gulf to various ports in Europe and the Mediterranean as set forth therein (A-16 to 16d).* The C.O.A. is based on a standard printed charter party form known as the ESSOVOY 1969. The form is divided into Part I and Part II. Clause 24 of Part II contains the arbitration clause in issue here and in relevant part provides:

> "Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the city of New York . . . before a board of three persons, consisting of one arbitrator to be chosen by the Owner, one by the Charterer, and one by the two so chosen."

Cepsa is not a party to the C.O.A. and is nowhere mentioned therein. It had no obligations thereunder. In par-

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* Reference "A" is to pages in the Appendix.

ticular, there is no reference to Cepsa or a "guarantor" in the arbitration clause, and by its terms only the "Owner", Nereus, and the "Charterer", Hideca, had the right or obligation to arbitrate.

Because Nereus was apparently concerned about the ability of Hideca to perform its obligations under the C.O.A., Nereus demanded and obtained a separate instrument of guaranty from Cepsa. This Letter of Guaranty is dated at Madrid, 24 June, 1971 and is signed by Cepsa, Nereus and Hideca (hereinafter the "Guaranty") (A-16e).

Although the Guaranty has the legend "Addendum No. 2" at the top, it is clear that it was a separate instrument from the C.O.A. In relevant part the Guaranty provides:

> "In connection with the contract of affreightment, embodied in the Charter Party drawn up at New York and dated 27th January, 1971 . . . we Compania Espanola de Petroleos, S.A., hereby agree that, should HIDECA default in payment or performance of its obligations under the Charter Party, we will perform the balance of the contract and assume the rights and obligations of HIDECA on the same terms and conditions as contained in the Charter Party."

The foregoing language refers to the C.O.A. as a separate and distinct instrument. That such was the intent of the parties becomes manifest upon an examination of the exhibits. In its telex of July 24, 1974 (A-55), Triton Shipping, Inc., as agent for Nereus, refers to the C.O.A. and Guaranty as separate instruments. In part the telex states:

> ". . . Owner refers to letter of guarantee in his favor given by Cepsa made and dated 24 June 1971 at Madrid by the terms of which Cepsa agreed that should Hideca default for payment or performance of its obligations under the contract of affreightment

> dated 27 January, 1971 . . . stop owner hereby gives Cepsa notice under said letter of Guarantee that Hideca is in default under the Charter Party and calls upon Cepsa to perform the balance of the Charter Party . . .''

In its telex of August 2, 1974, (A-70) Triton again emphasizes the distinction:

> ''. . . We have been advised by Nereus Shipping S.A. that under its guarantee with respect to the Hideca COA dated January 27, 1971 that due to the default of Hideca comma nereus has exercised it rights under the guarantee and has called upon you to perform the balance of the COA . . .''

In its telex reply of August 9, 1974, Cepsa also emphasized the difference between the C.O.A. and the Guaranty (A-71).

Only after Mr. Burke, a senior partner of Burke and Parsons, arrived on the scene at Madrid on or about August 20, 1974 does Nereus try to make the distinction disappear. In an artfully drafted extensive telex replete with lawyer's language, Mr. Burke attempts to make one ''Contract''.

> ''. . . By virtue of Addendum No. 2 of the Charter Party, Cepsa is a Party to that Charter with the obligation to perform following notice in accordance with its terms X Cepsa was and is a party to the Charter Party and by Addendum Nbr. 2 clearly agreed to be substituted in the place of Hideca for the balance thereof X since Cepsa now has refused to perform the balance of the Charter.''

This characterization of Cepsa as a ''party'' to the C.O.A. is essential to the Nereus position, as it is obvious,

even to Mr. Burke, that there is no provision for arbitration of disputes arising under the Guaranty.

This erroneous characterization of Cepsa as a "party" makes easy the completion of the Nereus argument that there is one "contract" and that the Guaranty ". . . was in the nature of a novation" (N-5).*

Cepsa has at all times maintained that it ". . . is not a party to the charter and cannot be required to arbitrate any disputes in connection therewith" (A-74).

Although the Nereus brief alludes to many other facts and circumstances which may be relevant to the determination of Cepsa's ultimate liability in an appropriate forum, such are not relevant to the narrow issues on these appeals and the proceedings in the district court cases. The central issue is whether there was an "agreement in writing" between Nereus and Cepsa to arbitrate disputes arising under the Guaranty.

D. *The Disputes Concerning Arbitration*

After the execution of the C.O.A. and the Guaranty, apparently 17 voyages were performed under the C.O.A. Both Hideca and Nereus claim that the other failed to properly perform their respective obligations under the C.O.A. and each have demanded arbitration of these disputes arising under the C.O.A., pursuant to Clause 24. On August 23, 1974, Hideca appointed Professor Andreas P. Lowenfeld as its arbitrator (A-17) and on September 9, 1974 Nereus nominated its arbitrator (A-19). The two arbitrators could not agree on a third arbitrator and Hideca instituted an action for the appointment of a third arbitrator (A-226), (hereinafter the "Nereus/Hideca arbitration").

Not content with one arbitration and aggrieved by the alleged failure of Hideca to perform under the C.O.A.

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* Reference "N" is to pages in the Nereus brief.

Nereus unilaterally claimed that Hideca was in "default" within the meaning of that word in the Guaranty, and called upon Cepsa to perform the balance of the C.O.A. (A-70). Cepsa refused to perform the balance of the C.O.A. because ". . . Hideca advises that it is not in default but Nereus improperly terminated such contract and, therefore, Cepsa's letter of guarantee must be deemed not in force and subsequently Cepsa is not obligated to perform the Nereus/Hideca contract of affreightment." (A-71).

On September 3, 1974, Nereus had served on Cepsa a letter demanding arbitration pursuant to Clause 24 of the C.O.A. and nominating Mr. Lloyd C. Nelson as its arbitrator (A-20). Cepsa rejected the notice by letter dated September 16, 1974 on the ground that the Guaranty did not provide for arbitration (A-75). Thereafter, Nereus appointed Mr. Manfred Arnold as a second arbitrator and those two chose a third arbitrator (A-29). By letter dated November 4, 1974, Burke and Parsons notified Poles, Tublin, Patestides & Stratakis that "The Arbitration Panel has now scheduled the first hearing in this dispute for November 21, 1974 at 5:00 in this office" (A-77) (hereinafter the "Nereus/Cepsa" arbitration).

The panel in the Nereus/Hideca arbitration was not completed as the arbitrators chosen by each were unable to agree on a third arbitrator.

E. *The Proceedings In The District Court*

Because of the announced intentions of Nereus to proceed with the purported arbitration against Cepsa and the obvious irreparable damage that could arise if the proceedings went unchallenged, Cepsa on November 20, 1974, filed in the district court a complaint (74 Civ. 5102) for declaratory judgment seeking a decision on the interpretation of the Guaranty; namely that the Guaranty did not provide for arbitration (A-4 to 7), and a related order to

show cause and temporary restraining order prohibiting Nereus ". . . from holding any hearing or other proceeding [in the Nereus-Cepsa arbitration] until trial and judgment in the plaintiff's action for declaratory judgment . . ." (A-3).

Oral arguments were heard before Judge Stewart on Cepsa's motion for a preliminary injunction (A-1), at which time various attorneys' affidavits were presented. Based on these affidavits, and without benefit of trial, Judge Stewart by an opinion and order of December 18, 1974 not only denied the motion for a preliminary injunction, but dismissed Cepsa's complaint for declaratory judgment (A-107). On January 17, 1975, Cepsa appealed (A-108).

Because the two arbitrators in the Nereus/Hideca arbitration could not agree on a third arbitrator, Hideca on January 30, 1975, instituted two actions: the first to restrain any proceedings in the Cepsa/Nereus Arbitration pending completion of the Nereus/Hideca Arbitration (75 Civ. 463) and the second to appoint a third arbitrator (75 Civ. 464). The cases were referred to Judge Stewart and again attorney's affidavits were presented and oral arguments heard. On March 20, 1975, Judge Stewart ordered that the two arbitrations be consolidated before a five member panel. On March 25, 1975, Nereus appealed (A-223).

F. *Jurisdiction Of This Court*

Jurisdiction of this court is provided for under 28 U.S.C.A. § 1291.

The appeal in docket number 75-7069 was taken from the opinion and order of the district court dated December 18, 1974 in case 74 Civ. 5102 (hereinafter the "first decision") which denied Cepsa's motion for injunctive and declaratory relief. On January 24, 1975, Nereus moved to dismiss the appeal "on the ground that the order appealed

from . . . is not an appealable order." Cepsa opposed the motion. On Feburary 11, 1975, this court "respectfully referred [the motion to dismiss] to the panel that will hear the appeal . . . It is further ordered that the question of jurisdiction should be briefed."

The appeals in docket numbers 75-7206, 75-7207 and 75-7208 were taken by Nereus from the decision and order of the district court, dated March 20, 1975, in cases 75 Civ. 463 and 75 Civ. 464, (hereinafter the "second decision") which ordered that the various disputes between Nereus, Hideca and Cepsa be consolidated and heard before a five member panel.

The Nereus brief does not raise or discuss the jurisdictional issues raised by the appeals. For the reasons hereinafter stated, this court has jurisdiction to determine the appeal from the first decision.

The first decision dismissed the Cepsa complaint for declaratory and injunctive relief and in effect concluded Cepsa's day in court. Thus, since the clerk was directed to enter final judgment (A-1), the case is appealable pursuant to 28 U.S.C.A. § 1291.

The second decision is significantly different and readily distinguishable; it merely ordered that the parties arbitrate all disputes before one panel consisting of five members. Such orders concerning arbitration are routinely entered by the district courts and have long been held not to be appealable.

ARGUMENT

Summary

An appeal clearly lies pursuant to 28 U.S.C. § 1291 from the first decision as findings and conclusions were made pursuant to Rule 52 (a) of the Fed. R. Civ. P. Although

Nereus initially moved to dismiss the appeal, the issue is not covered in its brief and, in light of the subsequent appeals taken by it, has apparently abandoned that position.

The sole issue raised by this appeal is whether there was an agreement in writing "between Nereus and Cepsa to arbitrate". The nub of the issue lies in the words of the Guaranty and not in the C.O.A. Nereus, in its brief, misleads when it seeks to combine the separate instruments into one "Contract" (N-1 and 2), as the lack of an arbitration clause in the Guaranty is fatal to its position. Its argument depends on the erroneous premise of one "Contract" as the cases clearly hold that a guarantor is not obligated to arbitrate disputes under the main contract. The district court erred in equating the guarantor-obligee relationship in this case to that of a charterer-owner relationship found in the typical bill of lading-charter party incorporation clauses. The court further erred by dismissing the complaint without a hearing.

Assuming, however, that this court affirms the first decision, then the second decision must also be affirmed. If Cepsa is required to arbitrate with Nereus then fairness, equity and the facts of the case clearly require the resolution of all issues before one panel.

POINT I

The first decision was final and appealable.

A. *The First Decision Was Final*

The instant complaint sought a declaratory judgment pursuant to 28 U.S.C.A. § 2201 and Rule 57 of the Fed. R. Civ. P. After hearing a motion for a temporary restraining order, the district court not only determined that motion, but also declared the rights of the appellant under the complaint and made findings pursuant to Rule 52(a) of

the Fed. R. Civ. P. (A-107). Thus, insofar as the district court was concerned, the controversy before it was at an end.

Section 2201 of Title 28 U.S.C. states:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

The relief requested in the complaint clearly brings it within the provisions of the statute. In part the WHEREFORE clause states (A-6):

> "WHEREFORE, plaintiff demands:
>
> 1. A declaratory judgment that . . .".

Rule 57 of the Fed. R. Civ. P. provides that "[t]he procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C. § 2201, shall be in accordance with these rules . . .". However, Cepsa was not permitted to proceed according to the Fed. R. Civ. P. because the district court in determining the preliminary motion for a temporary restraining order, also erroneously determined all the issues raised in the complaint by making findings and conclusions under Rule 52(a). Rule 52(a) provides:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . .".

There are many cases defining the phrase "final decision". In general, these words are given a practical and not a technical construction. These cases hold that it is not necessary to have a final judgment entered. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 13 L.ed.2d 199, 85 S. Ct. 108, 1965 A.M.C. 1 (1964). *Paliaga* v. *Luckenbach Steamship Company*, 301 F. 2d 403, 1962 A.M.C. 1632 (2nd Cir. 1962), was an action brought by a longshoreman for personal injury against the defendant who, in turn, impleaded the stevedore. At trial, the district court denied the defendant's motion to continue the trial against the stevedore. The defendant appealed. The first issue discussed was whether the appeal was proper. On this point, the court held:

> ". . . Neither the use of specific words nor the using of any particular action by the trial judge is necessary in order to signify that he has made his final judgment . . . What is required, however, is that there be some manifestation by the judge that it is his intention that the decision he makes is his final act in the case. . . . By his denial of the shipowner's motion to proceed with the trial of the third-party action, the judge below surely intended that the litigation before him was at an end. . . . Therefore, here, the appeal was timely taken from the denial of the motion to proceed with trial, and as the denial was a final order disposing of the litigation it was an appealable order under 28 U.S.C. § 1291." *Id.*, at 407

In the instant case, the court's opinion dealt with every issue raised not only by the motion but also by the complaint, and it disposed, with finality, all of them, leaving nothing to be done but the ministerial exercise of entering judgment, not by the judge, but by the clerk. The opinion was a "final decision" under 28 U.S.C. § 1291. See *Eisen* v. *Carlisle & Jacquelin*, 370 F. 2d 119 (2nd Cir. 1966), cert. denied, 386 U.S. 1035, 18 L. ed. 2d 598, 87 S. Ct. 1487 (1967).

B. *An Order Compelling Arbitration in an Independent Proceeding is Appealable.*

On November 21, 1974, the Nereus/Cepsa panel was due to commence hearings to determine the extent of Cepsa's obligations under the Guaranty.

Cepsa informed the members of the panel and Nereus that it was not required by the Guaranty to arbitrate before them the merits of any dispute with Nereus. When Cepsa was advised that the panel intended to conduct hearings, it commenced the action for declaratory judgment. This action, therefore, is independent from the arbitration proceeding. The district court denied, in toto, the relief sought by the appellant and refused to stay the pending arbitration. It is from that order that this appeal is properly taken.

In *Chatam Shipping Co.* v. *Fertex S.S. Corp.*, 352 F. 2d 291, 1965 A.M.C. 2437 (2nd Cir. 1965) the defendant-appellant appealed from an order directing it to proceed to arbitration. The plaintiff-appellee argued that such an order was not appealable. The court dismissed this argument and held at 294:

> "However, the rule in this court established after full consideration, is that although an order directing arbitration is interlocutory when made in the course of continuing litigation, it is considered a final decision when handed down in an independent proceeding Sec. 4 of the Arbitration Act."

This principle is so firmly established in this circuit that it was relegated to footnote 3 in *Interocean Shipping Co.* v. *National Shipping & Trading Corp.*, 462 F. 2d 673, 1972 A.M.C. 1687 (2nd Cir. 1972): "An order compelling arbitration under 4 of the Federal Arbitration Act is a final order and is appealable under § 28 USC 1291 (1970)." *id.*, at 675. See also *Farr & Co.* v. *Cia. International de Nave-*

gacion de Cuba, 243 F. 2d 342, 348, 1957 A.M.C. 450 (2nd Cir. 1957).

From the foregoing cases, all involving maritime causes, the general rule is well established that appeals from orders with respect to independent arbitration proceedings are proper.

POINT II

A guarantor is not obligated to arbitrate pursuant to the terms of the main contract.

The issues before this court are not whether Hideca defaulted or whether Nereus properly invoked the Guaranty. The issue is the very narrow question of whether Cepsa as a guarantor is obligated to arbitrate with Nereus. The cases have consistently held that a guarantor is not obligated to arbitrate under the main contract to which the guaranty is ancillary.

On June 24, 1975, this court held that "A mere guarantor of a charterparty generally cannot be compelled to arbitrate on the basis of an arbitration clause in the main agreement since it is not a party to that contract." *Interocean Shipping Company* v. *National Shipping and Trading Corporation, et al.,* Docket No. 74-1713, (2nd Cir. 1975) (not officially reported), p. 18. In that case the district court found that a charterparty had been made between Interocean and Hellenic and that National had guaranteed Hellenic's obligations. The district court then held that National was compelled to arbitrate with Interocean. That holding was reversed by this court. This court pointed out that "National, however was not a party to the charter agreement but a mere guarantor. Whether a guarantor can be compelled to arbitrate on the basis of an arbitration clause in the main contract must be considered separately from the question of a party's obligation to arbitrate." *Id.,* at 18.

It is precisely this distinction which Nereus avoids. If one starts with the Nereus premise that the instant case involves only one "Contract" with one arbitration clause binding all parties then the issue answers itself. But such are not the facts. Nowhere in the record is there any indication that the parties intended that there would be only one "Contract." (See this brief pages 2 to 5).

Even though the Guaranty is entitled "Addendum No. 2" this is not determinative of the issue. In *Taiwan Navigation Co.* v. *Seven Seas Merchant Corporation, et al.*, 172 F. Supp. 721, 1960 A.M.C. 855 (S.D.N.Y. 1959), the plaintiff-charterer sought to compel arbitration against the ship owner and its guarantor. Clause 46 of the charterparty provided: "It is understood that Kervin Shipping Corporation will guarantee performance of Seven Seas Merchant Corporation under this Charter Party".

In denying the motion, the court stated:

> ". . . Taiwan contends that Kervin must arbitrate Taiwan's claim against Kervin under the guaranty. This novel position is based upon a most strained reading of the charter party. Kervin contracted to guarantee Seven Seas' performance of the contract of hire. The charter is silent as to how disputes concerning Kervin's liability, if any, are to be resolved.
>
> Clearly, the arbitration contemplated by the charter party is arbitration between 'the Owners' [Taiwan] and 'the Charterers' [Seven Seas]. There is nothing in the writing to suggest that Kervin should have to arbitrate anything as a principal.
>
> The contention that Kervin must perform for Seven Seas by going to arbitration on its behalf is rejected." *Id.*, at 722.

Thus, even where the guaranty is contained in a clause of the charterparty, the obligations of the guarantor are separate and distinct from those of the primary obligor.

This court has also held that a guarantor cannot demand arbitration under the main contract since "Defendants [guarantors] are not parties to the arbitration agreement. The issues of the present action [on the guaranty] are not referable to arbitration between the parties." *Nederlandse Erts-Tankersmaatschappij* v. *Isbrandtsen Co.*, 339 F 2d 440, 1965 A.M.C. 177 (2nd Cir. 1964). See also *Orion Shipping and Trading Company, Inc.* v. *Eastern State Petroleum Corp. of Panama*, 312 F. 2d 299, 1964 A.M.C. 522 (2nd Cir. 1963), cert. denied, 373 U.S. 949, 10 L.ed. 2d 705, 83 S. Ct. 1679 (1963).

POINT III

The guaranty did not incorporate the terms of the C.O.A.

The first decision held that the guaranty incorporated the terms of the C.O.A., including the arbitration clause, because Cepsa agreed upon Hideca's default "to assume the rights and obligations" of Hideca under the C.O.A. The foregoing phrase does not incorporate the C.O.A. into the Guaranty but sets forth the duties of Cepsa to Nereus. There is now a dispute between Nereus and Cepsa over the meaning of those words. The proper forum for the resolution of that dispute cannot be controlled by an arbitration clause which is not part of that agreement. Under the district court's rationale, all disputes arising under the Guaranty must be resolved in the forum dictated by the arbitration clause of the C.O.A. a separate and distinct instrument. In reaching this decision, the court did not rely on any cases construing guarantees but cited those cases construing incorporation clauses in bills of lading. Those cases are readily distinguishable.

The primary case relied on by the district court was *Midland Tar Distillers Inc.* v. *M/T Lotus*, 362 F. Supp. 1311, 1973 A.M.C. 1924 (S.D.N.Y. 1973), which involved

the incorporation of an arbitration clause in a charter party into the bill of lading. The plaintiff, cargo owner, brought suit against the defendant for loss and damage to cargo shipped under a bill of lading. The defendants moved to stay the action based on the arbitration clause of the charter party. The court granted the motion. In relevant part the bill of lading was ". . . subject to all the terms, liberties and conditions of CHARTER PARTY . . ." *Id.*, at 1312. In the instant case, the Guaranty is not "subject" to any other contract. There is an obvious distinction in construction between a contract subject to the terms of another contract and a guaranty whereby the guarantor "assumes the rights and obligations" of another party. In the former instance the contract must be construed by reference to the contract to which it is subject; while in the latter instance the guaranty must be construed by reference only to its own terms.

Lowry & Co. v. *S.S. Le Moyne D'Iberville,* 253 F.Supp. 396, 1966 A.M.C. 2195 (S.D.N.Y. 1966), appeal dismissed, 372 F. 2d 123, 1967 A.M.C. 729 (2nd Cir. 1967), also involved a bill of lading and charter. There the bill of lading provided: "all conditions and exceptions as per charter party dated Paris 17th September 1963." *Id.,* at 397. The clear intent of those words was to make the bill of lading subject to terms and conditions of the charter party. Likewise, *Import Export Steel Corp.* v. *Mississippi Valley Barge Line Co.,* 245 F. Supp. 249 (S.D.N.Y. 1965), cited by Nereus (N-19) involved the incorporation of a charter party into the bill of lading.

In the foregoing cases, the charter party and bill of lading were integral parts of a single contract of carriage, The charters provided for issuance of bills of lading. In the instant case, the Guaranty is only ancillary to the C.O.A. Its only purpose was to secure the performance of Hideca under certain named conditions and had nothing to do with the transportation of the cargoes.

Clause 24 of Part II of the ESSOVOY form was not altered in any manner. It provides that disputes "arising out of this charter" shall be submitted to arbitration. There is no reference to either the Guaranty or to the guarantor. Further Cepsa did not sign the charter and would not be bound by the terms thereof. Thus Clause 24, standing alone, does not satisfy the requirement of an agreement in writing binding Cepsa to arbitrate. If such had been the intent of the parties, it would have been a simple matter to modify and broaden the clause to relate to and bind Cepsa. See *In Re Kinoshita & Co.*, 287 F. 2d 951, 1961 A.M.C. 1974 (2nd Cir. 1961), where the court suggested that the parties could have used the broad wording of American Arbitration Association standard clause.

The meaning of Clause 24 is evident from a reading of the Guaranty which refers to the C.O.A. as a separate instrument. The conduct of the parties at the inception of the disputes in July and August 1974, also referred to the C.O.A. and Guaranty as separate instruments (see pages 5 to 6 of this brief).

The words of this court in *Interocean Shipping Co.* v. *National Shipping and Trading Corp.*, Docket No. 74-1713, (not officially reported) (2nd Cir. 1975), are equally applicable here. At page 19, the court stated:

> "Although it might be said that National agreed to arbitrate since its guarantee was in the fixture telex and thus in the same document as the main agreement, that would be a fiction since the arbitration clause is in the Mobiltime agreement, not in the fixture telex."

In the instant case the arbitration clause is in the ESSOVOY 1969 form and not in the Guaranty.

POINT IV

The complaint should not have been dismissed without a hearing.

Cepsa brought this action pursuant to the Declaratory Judgment sections of Title 28; 28 U.S.C.A. §§ 2201, 2202. Therefore, pursuant to Rule 57 of the Fed. R. Civ. P., it was entitled to a hearing and trial. However, the complaint was dismissed prior to its being answered and solely on the basis of attorneys' affidavits. It was necessary for Cepsa to proceed by declaratory judgment because Nereus was proceeding with arbitration which might have irreparably harmed Cepsa. Under the usual circumstances, a person aggrieved by the refusal of another to arbitrate seeks an appropriate order under the Arbitration Act. However, in this instance, Nereus claims that the provisions of the arbitration clause in the C.O.A. are self-executing and therefore it did not need a court order in order to prosecute arbitration against Cepsa. Thus, Cepsa sought a court determination of whether it was bound to such arbitration. Cepsa is clearly entitled to this determination. In *Channel Master Corporation* v. *JFD Electronics Corporation,* 263 F. Supp. 7, 9 (E.D.N.Y. 1967), the court stated:

> "Under the Act jurisdiction was granted to the federal courts primarily to provide declaratory relief to a plaintiff who seeks to establish a right in order to guide his future conduct as well as one who seeks to escape liability. Such relief is also permitted where the purpose is not to avoid future damages but to clarify legal relations and afford relief from uncertainty and insecurity where there is an actual controversy."

The issue of whether Cepsa is bound to arbitrate with Nereus must be determined in accordance with the Arbitration Act, Title 9 U.S.C.

Section 2 of the Arbitration Act, 9 U.S.C.A. § 2, provides that ". . . an agreement in writing to submit to arbitration . . . shall be valid, irrevocable and enforceable . . .". Section 4 of the Arbitration Act, 9 U.S.C.A. § 4 provides that "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." There was no trial of that issue in the court below and the first decision should be reversed, and the action remanded with directions to hold such a hearing.

Cepsa raised this very point in the court below. The affidavit of Patrick V. Martin, dated November 20, 1974 (A-10 to 15), in support of Cepsa's motion for a preliminary injunction specifically requested a hearing.

> "11. The restraining order sought herein is necessary in order to preserve the position of the parties pending the determination of the principal action, plaintiff's [Cepsa'] suit for declaratory judgment. Seeking a declaratory judgment is the only viable option open to the plaintiff [Cepsa]. If the plaintiff were to proceed to arbitrate, it would probably be deemed to have accepted NEREUS' contention that the plaintiff [Cepsa] is required to arbitrate and to have submitted to the jurisdiction of the arbitrators and to be estopped from later contesting such jurisdiction. If the plaintiff [Cepsa] should do nothing other than merely refuse to participate in the arbitration, and it should later be found, for whatever reasons, to be properly a party to the arbitration agreement, then it would have acted at its peril and lost its opportunity to contest the issues in dispute.
>
> From the foregoing, it is apparent that a restraining order should be granted to preserve the positions of the parties pending a resolution of the issue of whether the plaintiff is a party to the arbitration agreement." (A-14-15)

The foregoing affidavit was submitted solely for the purpose of obtaining a preliminary injunction to preserve the relative position of the parties pending a trial of the issue of the making of an agreement to arbitrate. The explicit denial by Cepsa of any such agreement, the absence of any words of incorporation in the Guaranty and the rejection by Cepsa of a specific arbitration clause to be part of the Guaranty raises, at the very least, a genuine issue of fact which can only be resolved by a full hearing.

In *Interocean Shipping Co.* v. *National Shipping and Trading Corp.*, 462 F.2d 673, 1972 A.M.C. 1687 (2nd Cir. 1972), this court remanded the case because the district court had failed to hold any hearing on whether "National [the guarantor] is a party to the charter agreement and hence to the arbitration agreement contained therein". *Id.*, at 677.

In the instant case, Cepsa has denied being a party to the C.O.A. and the exchange of telexes, part of which are set forth in the attorneys' affidavits lend credence to that position. This satisfies the test set forth by this court in *Almacenes Fernadez, S.A.* v. *Golodetz et al.*, 148 F. 2d 625, 1945 A.M.C. 552 (2nd Cir. 1945), which stated at 628:

> "To make a genuine issue entitling the plaintiff to a trial by jury, an unequivocal denial that the agreement had been made was needed, and some evidence should have been produced to substantiate the denial."

Accord, *In re Kinoshita & Co., supra.*

Since Cepsa was not privy to the actual negotiations of the C.O.A. between Nereus and Hideca acting through various agents and brokers, it still does not have all the facts. Further, since the district court decided the case solely on attorneys' affidavits, Cepsa has been deprived of the pretrial discovery provided for in the Fed. R. Civ. P. and of the opportunity of making a complete record. If

Cepsa were to be permitted a hearing, it would introduce evidence in support of the following ultimate facts:

1. That during the negotiations of the C.O.A., it was understood that a guaranty of Cepsa would be required.

2. The guaranty would be a separate instrument.

3. The attempts of Nereus to have an arbitration clause placed in the guaranty were rejected by Cepsa and Nereus eventually dropped this requirement.

4. That Nereus, Hideca and Cepsa always referred to the C.O.A. and Guaranty as separate instruments.

5. That the arbitration clause of the C.O.A. was never intended by the parties to be incorporated into the Guaranty.

In *Battery S.S. Co.* v. *Refineria Panama, et al.*, 513 F. 2d 735, 1975 A.M.C. 842 (2nd Cir. 1975), this court reversed the district court which had granted summary judgment to the defendant on the basis of affidavits. One of the issues decided by the district court was whether the amendments to the charter party constituted an integrated agreement. The plaintiff ". . . argued that summary judgment was inappropriate because there was a genuine issue of fact concerning the meaning of the waiver and the intent of the parties" *Id.* at 737.

The court held that the affidavits "viewed in the light most favorable to appellant . . .", p. 739, raised factual issues which required a hearing. There are similar factual issues in this case which also require a hearing.

The right of Cepsa to a day in court to offer proof on these issues should not lightly be refused by this court.

POINT V

If this Court affirms the first decision, the second decision must also be affirmed.

Assuming that there is a binding arbitration agreement between Cepsa and Nereus, then the second decision of Judge Stewart ordering consolidation of all disputes in one forum is clearly correct and in accordance with this court's standards of equity, fairness and substantial justice.

The district court has inherent power to control its docket by making appropriate orders. *Nederlandse, supra.*

Similarly, it has the power, where separate arbitrations are pending before it, to order their consolidation on such terms as may be fair and just. *Robinson* v. *Warner,* 370 F. Supp. 828 (D.R.I. 1974). *Lavino Shipping Co.* v. *Santa Cecilia Co.,* 1972 A.M.C. 2454 (S.D.N.Y. 1972); *Chilean Nitrate* v. *Intermarine Corp.,* 1972 A.M.C. 2460 (S.D.N.Y. 1971); cf. *Showa Shipping Co. v. A/B Bellis,* 1972 A.M.C. 2458 (S.D.N.Y. 1972). See also *Vigo Steamship Corp.* v. *Marship Corp.,* 26 N.Y. 2d 157, 309 N.Y.S. 2d 165, 257 N.E. 2d 624 (C.A.N.Y. 1970), cert. denied, 400 U.S. 819, 27 L.ed. 2d 46, 91 S. Ct. 36 (1972).

The question then is not whether the district court had the power but whether it properly exercised that power. In reaching the decision to consolidate the court weighed the various competing factors.

The court acted properly in consolidating the actions as Cepsa would suffer substantial prejudice if it were required to arbitrate alone against Nereus.

Nereus claims that Hideca failed to pay the earned freight on the seventeenth voyage under the C.O.A. This failure gave rise to a "default" under the C.O.A. The "default" then triggered Cepsa's obligations under the Guaranty. Hideca denies that it is default and has vehemently

objected to the actions taken by Nereus and asserts that Nereus acted improperly, thus legally permitting Hideca to withhold the freight.

In his affidavit, Mr. Maloof (A-151) speaks of the "guilt", "bad faith" and "unbelievable conduct" of Nereus (A-151). At point 10 of his affidavit of February 20, 1975, Mr. Newman disputes in detail the erroneous factual assertions of Mr. Dillon (A-161).

Cepsa has no way of determining the merits of the factual issues in the disputes between Hideca and Nereus. It was neither the "owner" nor the "charterer" nor in any way connected with the voyage. In fact, the voyage from Ras-Tanura to Mohammedia, Morocco, was outside the discharge range specified in the charter. Article D of Part 1 of the C.O.A. (A 16) states:

> "Discharging Ports:
>
> One (1) or two (2) safe ports United Kingdom or Continent, Gibraltor Hamburg Range, option Scandanavia within Institute Warranties Limits one (1) or two (2) safe ports Mediterranean excluding Israel and Egypt option Canary Islands but always excluding Communist or Communist controlled countries."

Mohammedia is on the west coast of Africa. Thus the voyage which has given rise to these proceedings was one which was outside the express limits of the C.O.A.

Nereus' falling out with Hideca seems to have been precipitated by matters with which Cepsa was not involved.

It is obvious from the record on appeal before this court, that we are seeing the mere tip of a large iceberg of factual issues in the continued disputes between Nereus and Hideca. It is now apparent that there were many changes, waivers, alterations and amendments in the C.O.A. which Cepsa has guaranteed. Such changes in

performance under the C.O.A. may well excuse Cepsa from its obligations under the Guaranty.

The facts surrounding the foregoing disputes are not known to Cepsa. Cepsa is not in a position to defend the Nereus charges or avail itself of defenses against the Nereus claims under the Guaranty, unless all of the facts are brought out at a full and complete arbitration between Nereus and Hideca. Nereus obviously wishes to press the arbitration against the uninformed Cepsa, rather than against Hideca, who would be able to defend and refute the Nereus claims.

Nereus seeks to justify this unconscionable tactic by asserting that the damages sought against Hideca arose before the "default" while those sought against Cepsa arose after the "default". This argument is refuted by its own papers.

By its own terms, the C.O.A. has expired except for the disputes between the parties. Thus, Nereus is seeking money damages from Cepsa in the approximate amount of $3,000,000.00, for alleged failure to perform the balance of the C.O.A. It is also seeking the same damages, plus additional sums, from Hideca. (A-217) Therefore, as a practical matter, Cepsa's obligations under the Guaranty have been reduced to pay damages in the event Hideca cannot. If Nereus instituted separate proceedings in this court against Cepsa and Hideca, asserting essentially the same claims and seeking essentially the same relief, this court, undoubtedly would either stay the proceedings against the guarantor or order a consolidation of the two suits.

Since the district court had the power to order consolidation, it did not abuse its discretion in this instance.

Conclusion

Cepsa respectfully prays that this court reverse the decision of Judge Stewart of December 18, 1974, or, require a hearing on the issue of whether there was an agreement in writing to arbitrate between Nereus and Cepsa.

Should this court affirm the decision of December 18, 1974, then fairness and justice requires that it also affirm the decision of March 21, 1975.

Respectfully submitted,

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Patrick V. Martin
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John C. Mamoulakis
of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COMPANIA ESPANOLA DE PETROLEOS, S.A.,

Plaintiff-Appellant-
Appellee,

against

NEREUS SHIPPING, S.A.,

Defendant-Appellee-
Appellant,

and consolidated cases.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN, being duly sworn, deposes and says that he is over the age of 18 years. That on the 2nd day of September, 1975, he served two copies of Brief of Compania Espanola de Petroleos, S.A. as Appellant No. 75-7069 and Appellee in Nos. 75-7206 and 75-7208 on Baker & McKenzie, the attorneys for Appellee Hidrocarburos y Derivados, C.A. by delivering to and leaving same with a proper person in charge of their office at 375 Park Avenue in the Borough of Manhattan, City of New York, between the usual business hours of said day.

Irving Lightman

Sworn to before me this
2nd day of September, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976

Due and timely service of Two copies of the within Brief is hereby admitted this 2nd day of September 1975.

Stephen P. Kyne

.....

Attorney's for DEFENDANT-APPELLANT-APPELLANT NICHOLAS SHIPPING

COPY RECEIVED

SEP 2 1975

BURKE & PARSONS